Attorneys At Law

October 31, 2011

Mr. Corbin R. Davis
Supreme Court Clerk
PO Box 30052
Lansing, MI 48909

RE: PROPOSED MCR 6.202

Dear Mr. Davis:

I write to comment on proposed MCR 6.202.

I am an attorney who practices criminal defense and focuses my practice on the defense of those charged with driving while under the influence of either alcohol or drugs (commonly known as OWI/OWID). OWI/OWID is nearly my exclusive practice area at this time. I am an active member of the National College for DUI Defense, the National Association of Criminal Defense Lawyers, the Criminal Defense Attorneys of Michigan and the State Bar of Michigan Criminal Law Section. I do not express the views of any of those organizations, but only my own with this letter. I am also the author of the Michigan OWI Handbook for Thomson West Publishing. I am also an adjunct law professor of OWI/OWID practice at the Thomas M. Cooley Law School.

The specific language of the proposed rule that was published for comment is objectionable to me in the respect that it is not necessary. The prosecuting attorney could always seek a stipulation from a defendant/defendant's counsel to the admissibility of the report without a formal notice and demand provision. Michigan courts have long validated and upheld the right of confrontation. It should be clear in the rule and consistent with MCR 6.006 that it is the parties' right to waive confrontation, not that of his lawyer.

Often a lawyer is forced to make an ill-informed decision about waiving a substantial right contrasted against the pressure of what is perceived to be the Court's wishes, or those of the assistant prosecuting attorney with whom the lawyer is attempting to reach a plea agreement or try a case with. I have personally observed these dynamics in my 12 years practicing law in the Lansing area.

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Often, the lawyer is forced to make an important Constitutional decision and strategic decision without all of the information necessary. The rule itself requires that the "methods" be disclosed as part of the report. At this time, the Michigan State Police (MSP) is not reporting its measurement values in either OWI or OWID cases with uncertainty.

The MSP has prepared an uncertainty budget, but only discloses that uncertainty budget upon request. Further, it is not clear whether that uncertainty budget is scientifically reliable or sufficient. It is based on a powerpoint that was presented at the Society of Forensic Toxicology (SOFT). Dr. Michele Glinn testified at a hearing in Ludington, Michigan, before 79th Judicial District Judge Peter J. Wadel on Friday, August 26, 2011, that this was the source for the MSP uncertainty budget. There are six Type B sources of error and two Type A sources of error that derive (the Type A sources appear to be derived from the difference in values reported from one instrument to the other using two different aliquots: one compared to the internal standard t-butanol and all the other to the internal standard n-propanol). As to the six Type B errors, there is no justification or statistical or scientific data to support why these were chosen, why others were not chosen and what the relationship of these six values to the input parameters of the analysis in a so-called blood alcohol assay are.

Often, the Michigan State Police Laboratory is reticent, slow or otherwise behind in responding to either a Freedom of Information Act (FOIA) and/or a Subpoena for data including the calibration records for the instruments used to test a particular accused citizen's alleged blood for the time period that is relevant.

Often, the source of error that is the most significant is how the analyst performs the protocols on which he or she is trained. This can be based on what the analyst knows about the protocols and why each particular step is important. Further, there is always a component of subjective interpretation of the peak, whether or not it is a sufficient peak and/or the amount of the response in the gas chromatography process. Sometimes it is vital to hear live from the analyst in order to determine the full extent of the variance and/or whether there is reasonable doubt as to the propriety of the analyst's performance in any particular case. For example, if there is an indicator of a jagged peak on a chromatogram, then that may be an analysis that is the result of poor quality somewhere in the process and could be a false-positive; whether it is qualitative or quantitative.

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It is quite often the case that the report is admitted by stipulation, but it can only be after the attorney and the accused have the opportunity to fully explore the strategic value of same. Creating a "shall be admitted" system, absent an objection within 14 days of disclosure of the "report method", creates a system that is rife with ineffective assistance of counsel claims where the lawyer has not had the time, nor the opportunity to garner the expertise or consultation to fully explore these issues with the accused client, and many times, the alleged approximation of the blood alcohol analysis are outcome-dispositive in the case.

Please consider amendments to the proposed rule to reflect the allowance of additional time, full compliance by the Michigan State Police to any and all discovery requests as a condition precedent to the "shall be admitted" standard, or consider striking the rule altogether so that more time can be taken to assess the efficacy of these notice and demand provisions that were cited by the United States Supreme Court in the case of *Melendez-Diaz v Massachusetts.*

I stand ready, willing and able to respond to any and all questions, comments or concerns that the Court may have.

Very truly yours,

THE NICHOLS LAW FIRM, PLLC

Michael J. Nichols

MJN:JLM
Enclosure

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